No. 91-1448

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANDREW C. PUTKA,

Petitioner,

vs.

FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES OF AMERICA AND CANADA, JOSEPH R. KRISTOFIK, THOMAS J. GUIDISH, CYRIL M. FERENCHAK, STEVEN G. LUCA, REV. CHARLES HAWKINS, GEORGE YAKUBISIN, ANDREW S. BENO, ANDREW MICEK, JOSEPH J. KRAJSA, EDWARD G. YUHAS, REGIS BREKOSKY, CHARLES M. TEREK, STEVE YUSKO, MICHAEL RAGAN and MICHAEL DOBIS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Where a fraternal insurance society, subject to pervasive regulation and supervision by the state, expels a member-policyholder of a subordinate district that contested a reorganization plan prepared and submitted by the national officers to the state insurance department for approval, is there a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

2. Whether federal constitutional safeguards are implicated when a state court fails to accord a member-policyholder of a fraternal insurance society all of the existing remedies expressed in the law of the land for the protection of his rights.

3. Whether the actions of a fraternal insurance society are violative of the free speech and due process clauses, respectively, of the federal constitution when taken to expel an attorney-member for having represented his district branch in a controversy with the national officers.

4. Whether a fraternal insurance society that publishes defamatory falsehoods in its newspaper about a member-policyholder, who is neither a public official nor a public figure, may claim constitutional privilege against liability for the injury inflicted by those statements.

PARTIES TO PROCEEDING

The parties to this proceeding are those indicated in the caption of the case, to wit: Andrew C. Putka, First Catholic Slovak Union of the United States and Canada; Joseph R. Kristofik, Thomas J. Guidish, Cyril M. Ferenchak, Steven G. Luca, Rev. Charles Hawkins, George Yakubisin, Andrew S. Beno, Andrew Micek, Joseph J. Krajsa, Edward G. Yuhas, Regis Brekosky, Charles M. Terek, Steve Yusko, Michael Ragan, and Michael Dobis.

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TO THE SUPREME COURT OF OHIO

Petitioner, Andrew C. Putka, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court

of Ohio entered in this proceeding on December 11, 1991.

OPINIONS BELOW

The Supreme Court of Ohio dismissed petitioner's appeal sua sponte "for the reason that no substantial constitutional question exists," without rendering an opinion. The Journal Entry and Opinion of the State Court of Appeals is unreported. It appears, along with the Entry of the Supreme Court of Ohio, in the appendix hereto. The trial court entered an order, without opinion, granting summary judgment for the respondents on all claims.

JURISDICTION

The judgment entry of the Supreme Court of Ohio was entered on December 11, 1991, and this petition for certiorari was timely filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C.,Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law...abridging the freedom of speech....

Fourteenth Amendment, Section I:

> ...nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner filed a complaint and a motion for preliminary injunction against the First Catholic Slovak Union of the United States and Canada (hereafter FCSU) and its national officers, in the Common Pleas Court of Cuyahoga County, Ohio. Petitioner sought to enjoin the respondents pendente lite from excluding him as a duly elected

and certified delegate of his branch to the 43rd Convention of the FCSU which was to convene on August 13, 1988. The court denied the motion for a preliminary injunction.

Following unsuccessful appeals within the society, petitioner amended the complaint and demanded a trial by jury. The amended complaint alleged three causes of action: (1) Unlawful expulsion, (2) Outrageous acts and conduct of the respondents and (3) Defamation.

In the prayer of the complaint, petitioner demands, among other relief, "that the court issue a permanent injunction enjoining defendants and those persons acting in concert with them from interfering with and depriving the plaintiff of all rights and privileges of a member, or from otherwise exercising his rights ... secured to him by the laws and Constitutions of Ohio and of the United States."

Respondents filed a motion for summary judgment on all of the petitioner's claims. Petitioner countered the motion with the sworn statements of the complaint, evidentiary materials and a brief in opposition. The Common Pleas Court granted respondents' summary judgment on all of petitioner's claims without disclosing the basis of the ruling (App., p. 29, infra).

Petitioner appealed the trial court's judgment to the Court of Appeals, Eighth District, Cuyahoga County, Ohio, which affirmed the ruling below (App. p.2, infra).

With respect to the constitutional issue in the case, the State Court of Appeals indicated, "In Putka's first issue, he asserts his expulsion as a member of the FCSU was accomplished in violation of the Bylaws and contrary to the controlling laws of the land..." (App., p. 13, infra). "Implicit in the concept of protecting an individual's due process rights, both federal and state,

is that two elements must be met, viz., (1) a right or privilege must be deprived without due process; and, (2) state action must have accomplished the deprivation, i.e., the state must be the actor since private conduct, no matter how unfair, is not subject to scrutiny under due process requirements" (App., p. 13, infra). The appellate court went on to say that since "...plaintiff brought his claim against the FCSU and its fifteen named representatives who heard the charges and ultimately expelled him from membership without any allegation of state action government involvement,...plaintiff's argument that his expulsion was accomplished in violation of the 'controlling laws of the land' is not well taken and is overruled" (App., p. 14, infra).

The appellate court concluded by stating that "[p]laintiff was afforded all the essentials of due process in the proceedings undertaken for his appeal resulting in his

expulsion from the FCSU," (App., p. 20, infra), and declared that "...defendants were entitled to summary judgment since no material issue of fact remains to be litigated regarding plaintiff's due process claim under either the United States Constitution or FCSU laws" (App., p. 20, infra).

The petitioner appealed the decision of the appellate court to the Supreme Court of Ohio pursuant to Article VI, Section 2(B)(3) of the Ohio Constitution. This provision of the state constitution states, pertinent hereto:

> The Supreme Court of Ohio shall have appellate jurisdiction as follows:
>
> > (a) In appeals from the court of appeals as a matter of right in the following:
> >
> > > (iii) Cases involving questions arising under the Constitution of the United States or of this state.

The notice of appeal to the Supreme Court of Ohio stated: "This case involves a

substantial constitutional question and is one [the case on appeal] which did not originate in the Court of Appeals" (App., p. 30, infra).

In addition to the issue of summary judgment and other issues, petitioner confronted the Supreme Court of Ohio with the following issues: (1) whether a fraternal insurance society is above the law or a law unto itself in its relationship with the members; (2) whether a fraternal insurance society may bind a member in advance to renounce or waive his right to appeal to the courts for the redress of wrongs; (3) whether punishment of a member for criticizing the action of the national officers violates the member's right to freedom of speech; and (4) whether such a society may be held liable for defamatory statements published in its newspaper which affects or injures the member in his profession.

STATEMENT OF FACTS

The relevant material facts upon which summary judgment was granted to the respondents may be summarized as follows:

The FCSU exists by virtue of the laws of Ohio. It is a fraternal benefit society (hereafter "fraternal insurance society") organized as an Ohio corporation with a lodge system of branches divided into districts in Ohio and the other states of the United States and provinces of Canada. It operates not for profit but solely for the mutual benefit of its members and their beneficiaries, with provision for the payment of death benefits in accordance with the statutory requirements of the state[1].

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[1] As of December 31, 1990, the FCSU had a total insurance in force of $241,831.158, death certificates in force of 87,093, and total assets of $73,932,907. The Society has no social members. It has 504 lodges. 1990 Statistics of Fraternal Benefit Societies, 1991 Edition, published by The National Fraternal Congress of America, Naperville, Illinois.

The FCSU is regulated, investigated and supervised in detail by Chapter 3921 of the Revised Code of Ohio, which includes the public acts of Ohio on the subject. Section 3921.01 defines a fraternal insurance society as "an incorporated society conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system...having a representative form of government and which makes provision for the payment of benefits in accordance with Chapter 3921 of the Revised Code."

The statutes provide for the regulation, examination, investigation, and supervision of the Society by the Superintendent of Insurance, and require that any change in the corporate structure or bylaws must be approved by the Superintendent (App., pp. 32-37, infra).

Until the time of the events related herein, petitioner was a member of the

Stephen Furdek District of Cleveland, Ohio (hereafter "District"). He is and was at all times pertinent a member of the Bar of the State of Ohio and a practicing attorney in Cleveland, Ohio.

The respondents are officers and members of the Board of Directors of the FCSU. Respondent Joseph R. Kristofik (hereafter "Kristofik" or "president) is, and was at all times relevant, the President of the FCSU and ex officio president of the Board of Directors (hereafter "Board").

In March of 1986, the Board authorized the formation of a stock holding company for profit, also referred to as the "reorganization plan" (hereafter "Plan"), and approved the expenditure of several million dollars in connection therewith.

The adoption and implementation of the Plan caused concern and vigorous controversy among the members of the FCSU. One group of members that was especially disturbed by the

Plan was the Stephen Furdek District of Cleveland, Ohio. The District felt that the Board had no authority to sanction the organization of a stockholding company for profit, in view of the non-profit nature and scope of the FCSU as a fraternal insurance society, and not before such a radical change in the corporate structure had been submitted for consideration of the Convention -- the highest governing body of the FCSU.

Because of the respondents' persistence in implementing the Plan forthwith, the District decided to challenge the Plan, and therefore, authorized the petitioner to prepare and file a complaint with the Superintendent of Insurance of Ohio and to represent the District as its lawyer in the matter. As a result of the District's com-

plaint to the Superintendent of Insurance[2], the District, of which petitioner was a member, was accused by the President of the FCSU, respondent Kristofik, of failing to appeal to the FCSU before filing the complaint with the Department of Insurance, thereby violating 16.11 of the Bylaws (App., p. 7, infra).

On March 23, 1988, the Board, on charges brought before it by respondent Kristofik, expelled the plaintiff as a member of the FCSU, effective immediately, without giving notice of the charges and of the hearing to

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[2] In the Findings of Facts and Conclusions of Law with regard to the complaint of the District, the Superintendent stated, "Because no general membership convention has been held since the reorganization, there has been no opportunity to address these matters at such convention." The Superintendent of Insurance characterized the District's complaint before him as follows: "The applicant's [District's] request for the information has been made as a part of a good faith attempt to determine the nature of the reorganization plan and as a part of resolving confusion and engaging in legitimate internal debate regarding the reorganization plan."

the petitioner and with no opportunity for the petitioner to appear and to defend against the charges.

Petitioner appealed the Board's ex parte action in punishing him to the Supreme Court of the FCSU, in accordance with the Bylaws, without success.

The Board of Directors is empowered by Section 9.04(e)(f) of the Bylaws to punish a member for the violation of said laws, but only after a "due hearing and trial" (App., p. 38, infra).

Petitioner further appealed the Supreme Court's decision to the August, 1988, Convention of the FCSU pursuant to Section 11.11(c) of the Bylaws. This section grants the Convention the power to "hear and decide all appeals from the decision of the Supreme Court."

At the Convention, the petitioner's appeal was heard by a Committee of five persons selected by the respondent Kris-

tofik, the initiator of the accusation against petitioner. This proceeding was vigorously protested by the petitioner as being invalid, and therefore he did not appear before it.

The Committee decided that the petitioner be expelled from the FCSU. This decision, along with a motion to dismiss petitioner's appeal, was presented by the Committee to the Convention, and was approved by the latter.

Petitioner had been duly elected as a delegate of his Branch to the August, 1988, Convention, but he was not approved as such by the FCSU because of the action taken by the respondents in expelling him from the Society.

The respondent FCSU is the proprietor and publisher of a weekly newspaper entitled "Jednota." It is the official organ of the FCSU in which, all matters of official notice and concern to the members are pub-

lished. The paper is sent to all members and to the other fraternal benefit societies in the United States and Canada.

In the editions of March 23, April 27, and July 6, 1988, of the newspaper, respondent FCSU published reports prepared and submitted by respondent Kristofik, which stated, in essence, that the District had filed a complaint with the State Insurance Department, questioning the validity of the Plan, that respondent Kristofik, as President,"had dissipated Society assets, and was conducting business fraudulently or in a manner hazardous..." to the best interests of the FCSU. The report emphasized that the complaint had been filed by the president and secretary on behalf of the District, with a special note that the petitioner was the attorney for the District in the matter. A report published in several editions of the paper accused the petitioner of acting unethically, and of having "used his posi-

tion as a member of the Bar of the State of Ohio to harass the President and his Board of Directors in violation of the Bylaws... and without due consideration for his responsibilities as a member of the Bar of the State of Ohio," and that, as a consequence, the Board had resolved to file a complaint against the petitioner with the Grievance Committee of the Ohio State Bar Association (App. p. 40-42, infra).

It should be noted, however, that to petitioner's knowledge no complaint had been filed with the Bar Association.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT FEDERAL CONSTITUTIONAL IMPLICATIONS REGARDING THE PRINCIPLE OF THE LAW OF THE LAND AS FREQUENTLY EXPRESSED BY THE COURTS WITH RESPECT TO ITS APPLICATION IN PROTECTING THE RIGHTS OF MEMBER-POLICYHOLDERS OF A FRATERNAL INSURANCE SOCIETY WHICH HAVE NOT BEEN, AND SHOULD BE, SETTLED BY THIS COURT.

The question whether the constitutional concepts of due process and free speech may

be invoked to protect the rights of a member-policyholder of a fraternal insurance society, is a substantial one; it, therefore, should be treated by this Court.

The Supreme Court of Ohio did not render an opinion in dismissing petitioner's appeal on constitutional grounds. Therefore, references herein are to the opinion of the State Court of Appeals (hereafter "Appellate Court").

STATE ACTION

The FCSU is an Ohio-created private fraternal insurance association. The foundation of the Society is the law of Ohio. It provides the unifying control over the rights and privileges of the members.

The Society is regulated, supervised and controlled in detail by Chapter 3921 of the Ohio Revised Code, and includes public acts of Ohio on the subject. These Ohio statutes are primarily pervasive schemes under which

the State dictates and constantly supervises virtually every important aspect of the Society's affairs, and exercises dominant control in a far-reaching manner.

In the present case, the State was heavily involved in the respondents' reorganization plan to create a stock-holding company for profit, which is the genesis of the instant controversy between the parties. The implementation of the Plan by the respondents required the approval of the Superintendent of Insurance. The State's authority to approve or reject the Plan provoked the concern and interest of the District and was the sole motivation for the filing of the complaint with the Superintendent of Insurance. It was only because the District resorted to and invoked the protection of the State regarding the Plan -- a right secured to the members by the State -- and the petitioner's role in presenting the

complaint to the Superintendent, that he was severely punished by the Society.

The central inquiry as to state action is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a reasonable conclusion of state involvement.

In Lugar v. Edmondson Oil Co., 457 U.S. 937, this Court declared that deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible.

In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), this Court stated the issue of state action as follows:

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself.

Under the factual record of the present case, the District, as a member branch of the FCSU, had a right granted to it by the laws of Ohio governing fraternal insurance societies, to complain directly to the Superintendent of Insurance about the reorganization plan submitted by the respondents for his approval. As a direct result of the District's lawful complaint to the Superintendent of Insurance, the District's member and attorney in the matter - petitioner herein - was expelled from the Society by the respondents and thereby deprived of his membership in the FCSU.

Petitioner believes it is beyond dispute that the interaction between the petitioner, the respondents and the State Insurance Department relative to the challenged Plan brought about the deprivation of petitioner's rights in the FCSU.

The respondents' action in seeking state approval of the reorganization plan, the

State's ultimate responsibility regarding the Plan, and the District's complaint to the State about the Plan, resulting in the petitioner's expulsion from the FCSU, are sufficiently intertwined and closely connected "so that the action of the latter may fairly be treated as that of the State itself."

Justice Stevens, writing for the Court in National Collegiate Athletic Association v. Tarkanian (1988), 109 S.Ct. 454, posited the question applicable to the factual record of the present case, as follows:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat the decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct.

In the instant matter, the respondents "took the decisive step [unlawful punishment of the petitioner] that caused harm to the plaintiff [petitioner]," in a situation in

which "the State created the legal framework governing the conduct" [the statutes requiring state approval for the reorganization plan and the District's rightful challenge of the Plan directed to the Superintendent of Insurance]. It is, therefore, reasonable to conclude from such a factual situation that the State was sufficiently involved to treat the decisive conduct as state action.

The court found that petitioner violated the Bylaws by filing the complaint with the Insurance Department without first exhausting the internal remedies of the society, and that such violation was punishable by expulsion from membership. The court held that the action taken against petitioner by respondents was justified under Section 16.11 of the Bylaws.

The finding of the appellate court with respect to the basis for the petitioner's expulsion is erroneous on two counts. First, the decision to complain to the Insurance

Department about the Plan submitted by the national officers was taken by the District branch and was not the unilateral action of the petitioner. True, petitioner filed the District's complaint and pursued it with the Insurance Department. But petitioner did so as the attorney for the District and not pro se. There is no support whatsoever in the record that the petitioner acted ex parte in the matter.

It must be emphasized that the respondents singled out the petitioner, along with the president and secretary of the District, for punishment, despite the fact that the decision to complain to the Insurance Department had been made by the membership of the District.

Second, the complaint that the District branch filed with the Insurance Department was not in the nature of "an action or complaint" that is filed in "any civil court" as contemplated by the Bylaw. Quite clearly,

the District had a right to complain directly to the Insurance Department about the Reorganization Plan submitted for approval by the respondents. Since state law required that such a drastic undertaking as the Plan must be approved by the Insurance Department, it is logical that all interested parties should be heard by the state agency concerning such a critical matter. With reference to the propriety of the District's challenge to the Plan the Superintendent of Insurance stated, "Because no general convention has been held since the reorganization, there has been no opportunity to address these matters at such convention." The Superintendent continued, "The applicant's [District's] request for information has been made as a part of a good faith attempt to determine the nature of the reorganization plan and as a part of resolving the confusion and engaging in legitimate internal debate regarding the reorganization plan."

The fallacy of the court's finding is further illustrated by respondent Kristofik's letter to the Superintendent of Insurance assuring him that the right of members to complain to the Ohio Department of Insurance is inviolate.

Thus, we see that the petitioner was deprived of his rights and privileges without having committed any proscribed act or having violated any law, either of the FCSU Bylaws or of the state. It is abundantly clear from the record that petitioner incurred the wrath of the respondents because he represented the District in its complaint to the Insurance Department, challenging the validity of the Plan.

Although petitioner believes that Section 16.11 is inapplicable as a legal basis for the petitioner's expulsion, there is a related issue of grave public policy, to wit, whether a fraternal insurance society may bind a member in advance to renounce or waive

his right to appeal to the courts for redress of wrongs by reason of a provision in the society's laws.

The landmark case in Ohio on this issue is Meyers v. Jenkins, 63 Ohio St. 101, wherein the Supreme Court of Ohio enunciated the public policy basis for the invalidity of Section 16.11 of the FCSU Bylaws. At pages 120-121, the court declared:

> ...[A] party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs. If this could be done an association might be formed in the state which would renounce our constitution and laws, and set up a different system of government for themselves, and in case of wrongs and oppression they would be debarred from resorting to our courts, and would be compelled to submit to the decisions of their own tribunals, and would most likely become dissatisfied and disorderly, resulting in riot and bloodshed. The whole state has an interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract in advance, deprive himself of the right to appeal to them.

In the case of Baltimore & Ohio Rr. Co. v. Stankart, 56 Ohio St. 224, the court declared at page 232:

> Courts are created by virtue of the Constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for any one, by contract, or otherwise, to deprive himself of their protection. (Underscoring supplied.)

The author of American Jurisprudence 2d, Volume 26, Section 52, states, as follows:

> The courts in this holding proceed upon the theory that it is not competent for a person, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of certain individuals named in the contract shall be final and conclusive. It has also been pointed out that a provision of this kind [Section 16.11 of F.C.S.U. Bylaws] is inequitable and invalid since its effect is to leave the arbitration of the controversy to one of the interested parties to the contract. (Underscoring supplied.)

The petitioner, as a long-time member and officer of the FCSU and, especially as a lawyer well versed in the intricacies of

the Plan, was the appropriate person to file and handle the complaint challenging the respondents' attempt to restructure the Society. The concern about the Plan's validity was a critical one, in several respects. One, the Plan involved the formation of a "holding company" for profit, and the investment of huge sums of the Society's money, contrary to the fundamental character of the body - a non-profit organization. Second, the right to discuss the merits and validity of the Plan, openly and freely, had never been afforded the members. The Superintendent of Insurance recognized the importance of this right in his statement that there had been no opportunity to address these matters by the membership because no membership meeting of the Convention had taken place since the reorganization plan had been created.

Petitioner was singled out because of his courage and advice, and his resistance to what appeared to him as oppressive and illegal conduct. The respondents, in their control of the FCSU, refused to grant either recognition or tolerance to parties of differing opinions, such as those of the petitioner and members of his District. No authority is needed for the proposition that the respondents' actions against the petitioner are repugnant to our system of jurisprudence. Our law does not countenance any action which interferes or may interfere with the function of a lawyer, or that seeks to intimidate him in the pursuit of his duties.

The appellate court's rationale in placing its imprimatur on the respondents' unlawful acts and conduct is enigmatic, to say the least. The court completely disregarded the crucial issue and crux of the case as presented by petitioner, to wit:

That petitioner was expelled without the benefit of a "hearing or trial". The record is totally devoid of any mention or consideration of that issue by the court. It concentrated entirely on the appeal process within the Society, and based its decision solely on the fact that the petitioner had been afforded the right to appeal to other forums of the Society. The court stated:

> Plaintiff clearly was afforded all the essentials of due process in the proceedings undertaken for his appeal resulting in his expulsion.... The appeals process was conducted in strict adherence to the facial provisions of the FCSU Bylaws at Section 16. Plaintiff failed to produce any evidence of mistake, fraud or management activity in excess of corporate powers; hence Ohio law requires the decision of the Convention, the ultimate body of the FCSU, be accepted by the court in the case sub judice.

In effect, the court of appeals has ruled that, since the petitioner had been afforded appellate proceedings within the

FCSU, and had exhausted such process, the rulings of the FCSU are "final and must be accepted by courts of law." The rule that emerges from such a decision is that once a member has exhausted the internal remedies of the association, he has no further right to resort to a court for judicial review, irrespective of the merits of his complaint. This is wholly untenable as a matter of law.

Petitioner believes that the appellate court confused trial procedure and its scope and purpose with the nomenclature of appellate review.

The appellate court found untenable the petitioner's contention that his expulsion had been accomplished in violation of the controlling laws of our land. The judgment of the court, in upholding the ex parte finding of guilt and the imposition of punishment by the Board of Directors, rejected the well established decisional

law requiring that there must be charges which justify the punishment, and the accused must have notice of the charges and a fair trial upon the charges before an impartial tribunal.

In the instant case, it had been fully proven that the petitioner was not only denied a trial or hearing upon charges which resulted in the punishment, but that the ex parte hearing, whereby petitioner was expelled, was not conducted by an impartial body. The party who brought the charges before the Board, respondent Kristofik, was also the President of the Board; and the other respondents, who were members of the Board and the same persons who had been accused of wrongdoing in the reorganization plan, constituted the "trial board" that heard and ruled on the expulsion of the petitioner from the Society. Thus, those who had been accused of

wrongdoing, sat in judgment on the complainant.

In a similar situation in which members of a fraternal association accused the national officers of unlawful conduct, an Ohio court made the following observation:

> To permit the officers themselves, whose conduct was assailed, to try and expel members on such charges, would, at least in the absence of clearest authority and full showing of right, violate the plainest principles of justice. (State ex rel. Fritter v. Fraternal Mystic Circle, 9 C.C. 364.)

The courts have uniformly expressed the controlling rule in the following manner, to wit: "The law ensures to every member of such an association a fair trial, not only in accordance with the constitution and bylaws of the association, but also with the demands of fair play, which in the final analysis is the spirit of the law of the land"; "such member must

have a reasonable opportunity to be heard and defend against charges preferred against him, without which opportunity any expulsion would be void."

The petitioner did not and does not claim that the FCSU does not, and should not, have the authority to discipline its members. Instead, the contention was and is strongly made that before punishment is meted out, there must be charges which justify the punishment, and the accused must have notice of the charges and a fair trial upon those charges before an impartial tribunal. This is the gravamen of petitioner's claim. In striking down the wrongful actions of voluntary associations, the courts have invoked due process concepts to protect the rights of the aggrieved member. The courts have expressed the concept in different ways. Some have declared that the punishment must be in accordance with the "demands of fair play,

which in the last analysis is the spirit of the law of the land," Bricklayers', Plasterers' and Stone Masons' Union v. Bower, 183 NYS 855; and "must not violate the plainest principles of justice," State ex rel Fritter v. Fraternal Mystic Circle, (Ohio), 9 C.C. 364.

In commenting upon the unlawful conduct of the national leadership analogous to the actions taken by the respondents, the court in Yokel v. German American Bund (1940), 20 NYS 2d 273, opined:

> It is contrary to the law of the land and the safeguards guaranteed to every member by the United States Constitution. While such authoritarian practices in certain places are now a matter of common knowledge, they may not be permitted to affect this plaintiff's right of membership as measured by constitutional provision and our system of jurisprudence.

The author of 4 American Jurisprudence 466, 472, section 17, stated that "the decisions of any kind of voluntary society

or association in disciplining, suspending, or expelling members" are scrutinized to determine, among other things, "whether or not there was anything in the proceeding in violation of the laws of the land." (Underscoring added.)

The Ohio court in Armstrong v. Duffy, 90 Ohio App. 233, 251, in a case involving the validity of certain punitive actions of the national officers of a labor union against dissenting members, stated the limitations upon the power of such associations to punish, as follows:

> Under our system of jurisprudence, the courts are open to all citizens, and no person shall be deprived of life, liberty or property without due process of law and any provision of any organization restricting its members from pursuing their rights must be strictly construed.
>
> (The court went on to cite Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 16, Article 1 of the Ohio Constitution [App., p. 31, infra].)

The court continued:

> The foregoing provisions of the federal and state constitutions insure the right of every citizen of this state to seek remedy by court action for injuries done to him in his person or property and entitle him to have justice administered according to law without denial or delay, and any person who attempts to interfere unlawfully with this right is guilty of a violation of the fundamental principles guaranteed by the constitutional provisions.

There are a great number of decided cases dealing with the principle of "the law of the land." In 16C C.J.S. 495, Constitutional Law, it is said that "law of the land" is synonymous with "due process of law."

This presents the question whether the principle "law of the land" implicates the protections of the First and Fourteenth Amendments under the factual situation of the within controversy. The Fourteenth Amendment "was intended to preserve and protect rights long recognized under the

common law." Butler v. Perry (1916), 240 U.S. 328, 333.

It is undisputed that the petitioner was punished by expulsion from membership in the FCSU because of the District's complaint to the Ohio Department of Insurance. It is important in this respect to recall the Superintendent's statement concerning the complaint, to wit: "the request for information" sought by the complaint was made in "good faith," and "...as part...[of] engaging in legitimate internal debate regarding the reorganization plan."

The Superintendent quite properly recognized that in the final analysis petitioner, as a member of the District, and others, were merely exercising their right of free speech.

Did the respondents' punishment of the petitioner violate his right to freedom of speech? Stated otherwise, is the petitioner entitled to the protection of the First

Amendment to the Constitution of the United States under the factual circumstances of this case?

Petitioner believes that the public policy considerations of "due process of law" and "free speech" principles involved herein justify the grant of certiorari to review the judgment below.

A STATE MAY NOT, CONSISTENT WITH THE FOURTEENTH AMENDMENT, ENFORCE A DECISION OF A FRATERNAL INSURANCE SOCIETY EXPELLING A MEMBER-POLICYHOLDER WHO WAS NOT ACCORDED THE REMEDIES OF THE LAW OF THE LAND TO PROTECT HIS RIGHTS.

It is an elementary precept in our concept of the law that a human being has an inherent right to due process of law, 16C C.J.S., Constitutional Law, Section 949.

The evidence is unrefuted that the petitioner was falsely charged and unlawfully punished without having been accorded all the existing remedies provided by the law for the protection of his rights. Clearly,

such proceedings are a complete nullity. Yet, the state court placed its imprimatur on such unlawful action.

This Court has had occasion to consider the constitutional consequences of such state action in Postal Telegraph Cable Co. v. Newport (1918), 247 U.S. 464, and Brinkerhoff-Faris v. Hill (1930), 281 U.S. 673.

Hill involved a suit in equity to enjoin the collection of a state tax. During the period preceding plaintiff's action, the state supreme court had ruled that the state tax commission did not have the powers and duties conferred upon it. This decision had been followed by the supreme court itself in cases after that ruling and had been adhered to by the tax commission. In the plaintiff's case before the supreme court, the latter expressly overruled its earlier decision regarding the authority of the tax commission. The possibility of relief before the tax commission had not been known

by anyone until the supreme court had filed its opinion in the plaintiff's equitable suit. By then, it was too late for the plaintiff to resort to the newly found remedy -- the tax commission.

In Hill, this Court found that the state supreme court's refusal to hear plaintiff's equitable suit and to grant the relief requested, not because of any lack of power or of any demerit in the complaint, but because plaintiff had not sought an administrative remedy which, in fact, had never been available and was not presently open to him at the time of his equitable suit, deprived plaintiff of a remedy. This Court concluded that since plaintiff was denied the only remedy ever available for the enforcement of its right to prevent the seizure of his property due to the tax assessment, the judgment deprived the plaintiff of his property. Thus, the Court found, the

transgression of the Due Process Clause of the Fourteenth Amendment was obvious.

This Court's observation in Hill is especially enlightening regarding the constitutional issue herein. The Court stated at page 682:

> ...[While] it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

In Hill, this Court declared: "We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law - using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The State court in the Newport case enforced a judgment against the complaining

party on the basis of res judicata, although the complainant was neither a party nor in privity with a party therein. The court stated as follows:

> The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citation omitted). The opportunity to be heard is an essential requisite of due process of law in judicial proceedings (citations omitted). And, as a State may not, consistent with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citations omitted), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

With regard to the question whether state law, in the case, is independent of the federal questions, the Court declared:

> Waiving the doubt whether under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions

> that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment, and for this reason it is inconsistent with another federal right of defendant, fundamental in character. (Emphasis supplied.)

The aforementioned holding can be applied with equal force to the instant case, to wit: the decision of the respondents expelling petitioner "is so ill-founded that it cannot sustain the state court judgment, and it is for this reason that it is inconsistent with another federal right of the [petitioner], fundamental in character."

In petitioner's case, the State court disregarded the requirement of due process in the proceedings pursued by the respondents against the petitioner, and gave conclusive effect to their unlawful actions. According to the rationale of and ruling in Hill and Newport, supra, the State court judgment is constitutionally void.

DEFAMATION

The newspaper involved in the instant cause is the official organ of the FCSU and it is used primarily for the publication of official reports and proceedings of the Society and to inform members about other matters of mutual concern.

In the several reports published about the controversy in the FCSU newspaper, it was stated that the District's complaint to the Insurance Department was an "unethical attempt to discredit the Society in the fraternal insurance system, and with the Ohio Department of Insurance." The publication further stated that the petitioner used his position "as a member of the Bar of the State of Ohio" to harass the President and Board of Directors in violation of the By-laws of the FCSU and in disregard of petitioner's "responsibilities as a member of the Bar of the State of Ohio." In this connection, it was also reported that the

Board of Directors had determined "to file...a formal complaint before the Grievance Committee of the Ohio State Bar Association protesting the improprietary (sic) of the actions of and the harassment of the President and this Board of Directors of the First Catholic Slovak Union by attorney Andrew C. Putka."

To the unsophisticated reader, such statements may reasonably be interpreted to mean that the petitioner is a "shyster lawyer." The American College Dictionary defines "shyster" as: "A lawyer who uses unprofessional or questionable methods." Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, states: "a person, especially a lawyer, who uses unethical or tricky methods" -- certainly, an odious and disreputable characterization attributed to the petitioner by the challenged publication. Undoubtedly, such

defamatory statements could have dire consequences for a lawyer.

The factual record shows unequivocally and emphatically that the petitioner was expelled from the FCSU because he had acted as the attorney for the District in its complaint to the Insurance Department, and that petitioner had not violated any law in such representation. Indeed, his professional acts cannot be viewed as "unethical" or as conduct in disregard of petitioner's "responsibilities as a member of the Bar of the State of Ohio" by any stretch of the imagination.

The unrefuted evidence that the petitioner was falsely charged and unlawfully punished, and therefore not guilty of any wrongdoing, compels the determination that the defamatory statements were published "with actual malice," that is, "with knowledge the statements were false, or in reckless disregard of the truth."

The respondents could have informed the members about the controversy with the District regarding the Plan, properly and adequately, without publishing the defamatory statements used by them. In so doing, the respondents have forfeited any protection they may have had in the matter.

The State Court of Appeals held that the respondents were entitled to assert the defense of qualified privilege to the defamatory statements of the publication, "since plaintiff failed to allege actual malice" as required by New York Times Co. v. Sullivan (1964), 376 U.S. 254, which was cited in the Ohio case of Perez v. Scripps Howard Broadcasting Co. (1988), 35 Ohio St. 3d, 215, 218, and was invoked by the appellate court to support its decision.

The question which arises in this connection is whether the facts of the present case are wholly within the First Amendment concerns expressed by this Court in New York

Times Co. and its progeny. Stated otherwise, is the FCSU publication the type of media worthy of First Amendment protection as contemplated by the decisions of this Court?

Certain it is that the defamatory statements in the present case do not involve a public official or a public figure or a matter of public concern. It is speech on "matters of public concern" that is "at the heart of the First Amendment's protection," First National Bank of Boston v. Bellotti, 435 U.S. 765.

Absent the involvement of a "public official," or a "public figure," or a "private figure-public issue matter," presumed and punitive damages for false and defamatory statements are not prohibited by the First Amendment. This Court has long recognized that the State has a strong and legitimate interest in compensating private individuals for injury to reputation.

Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323; Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., (1985), 472 U.S. 763, 105 S. Ct., 2639.

In any event, it is not realistic to claim that the respondents' interests warrant special protection, since the published statements about the petitioner are per se wholly false and clearly damaging to the petitioner's profession.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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